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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5634

COMPLAINT FILED: December 28, 2004

DATE OF NOTIFICATION: January 5, 2005

DATE ACTIVATED: May 10, 2005

EXPIRATION OF STATUTE OF LIMITATIONS:
November 1, 2009

COMPLAINANT: Edmund A. Hamburger

RESPONDENTS: Sierra Club, Inc.¹

RELEVANT STATUTE AND REGULATIONS: 2 U.S.C. § 441b(a)
11 C.F.R. § 100.22
11 C.F.R. § 114.4(b)(5)(i)

INTERNAL REPORTS CHECKED: Disclosure Reports and FEC Contributor Database

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter arises from a complaint alleging that the Sierra Club, Inc. ("Sierra Club" or "respondent") violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by "advocating the election of Senator John Kerry for the presidency of the United States" through four communications issued prior to the November 2, 2004 General Election. *See* Complaint at 1. As discussed in more detail below, this Office concludes three of the communications do not contain express advocacy and that one—"Let your Conscience be your Guide"—does contain

¹ The respondent in this matter was designated as Sierra Club-Florida Chapter Sierra Club, Inc, however, is the only legally recognized corporate entity of the Club in the United States. According to the bylaws and standing rules of the Sierra Club, Inc and counsel for the respondent (*see* response at footnote 1), the Sierra Club Florida Chapter is a subunit and branch of the Sierra Club, Inc and not a separate legal entity. Accordingly, this Office has changed the name of the respondent in the Case Management System to Sierra Club, Inc

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1 express advocacy. We recommend that the Commission find reason to believe that the Sierra
2 Club violated 2 U.S.C. § 441b(a) on the basis that one of the communications contained express
3 advocacy. The ensuing investigation will focus on discovering the costs associated with the
4 expenditure.

5 **II. FACTUAL AND LEGAL ANALYSIS**

6 The Sierra Club, a non-profit environmental corporation based in California, produced
7 and distributed four pamphlets prior to the November 2, 2004 General Election that are the
8 subject of this matter. The pamphlets at issue are entitled: (1) "From one friend of our
9 environment to another" ("Friend"); (2) "The Environment for Dummies" ("TED"); (3) "The
10 Dirt"; and (4) "Let your Conscience be your Guide" ("Conscience"). If the pamphlets the Sierra
11 Club funded and distributed contain express advocacy, then the disbursements for them were
12 expenditures made in connection with an election to political office, which the Act prohibits
13 corporations from making. 2 U.S.C. § 441b(a). The Supreme Court held in *FEC v.*
14 *Massachusetts Citizens for Life*, 479 U.S. 238, 249 (1986) ("*MCFL*") that a corporate
15 expenditure for a general public communication, if made independent of a candidate and/or his
16 campaign committee, "must constitute 'express advocacy' in order to be subject to the
17 prohibition of § 441b." We examine each of these communications in detail below.

18 **A. "Friend" and "TED" pamphlets**

19 On its website, the Sierra Club states that it has over 750,000 members and is
20 "America's oldest, largest and most influential grassroots environmental organization." See
21 www.sierraclub.org/inside/. In response to the complaint, the Sierra Club cites "grassroots
22 lobbying" communications as a way it advances its mission of protecting the environment.

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1 Response at 2. In this type of communication, respondent “reaches out to the general public to
2 educate them about the positions of individual lawmakers and to ask them to contact these
3 lawmakers with specific messages.” *Id.* Respondent states that two of the four pamphlets cited
4 by the complaint were examples of “grassroots lobbying,” and argues that these communications
5 do not expressly advocate the election of Senator Kerry.

6 **1. Description**

7 The first of these two pamphlets, the “Friend” pamphlet, shows on its cover page a
8 picture of an upright polar bear with the phrase “From one **friend** of our environment to
9 **another. . .**” (emphasis in the original). Attachment 1. The remainder of the pamphlet contains
10 statements such as “Throughout his career, John Kerry has repeatedly fought to clean up toxic
11 waste sites, to keep our air and water clean, and to protect the Arctic National Wildlife Refuge
12 and other pristine public lands” and “[Kerry] co-sponsored legislation that would hold polluting
13 corporations, and not taxpayers, responsible for paying to clean up abandoned toxic waste sites.”
14 The pamphlet then directs the reader to “E-mail Senator Kerry at John-Kerry@kerry.senate.gov
15 and ask him to continue protecting our environment by: “Continuing to put taxpayers, not
16 polluters, first [and by] Continuing the fight to get mercury out of our lakes, streams and fish.”
17 The pamphlet also includes a photograph of Senator Kerry standing in casual attire, surrounded
18 by trees. *See* Attachment 1 at 3. To the left of the photograph is the following statement: “THE
19 JOHN KERRY ENVIRONMENTAL RECORD Take a closer look.” *Id.*

20 The second example of the so-called “grassroots lobbying,” the “TED” pamphlet, appears
21 to be a take-off on the popular books “for dummies” series. Attachment 2. The cover page is
22 entitled “The Environment for Dummies,” and contains a quotation at the bottom right corner

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1 from a “corporate polluter” that states, “This administration has rewritten the book on a healthy
2 environment! My shareholders are grateful!” On subsequent pages, the pamphlet displays a
3 series of visual images sandwiched between two types of statements. The statement directly
4 above each image appears to represent the Sierra Club’s view of appropriate environmental
5 policy, while the statement below the image appears to represent what the Sierra Club views as
6 the Bush administration’s environmental policy. For example, the statement “Clear our skies...”
7 is displayed above an image of an industrial plant and the statement “...by allowing corporations
8 to write their own rules” is shown directly below the image. The pamphlet then poses the
9 question: “What book is George W. Bush reading when it comes to our health and safety?” and
10 notes that “[i]n President Bush’s America, corporate polluters have the upper hand. Laws that
11 protected us, like the Clean Water and Clean Air Acts, have been rolled back for new polluter-
12 friendly laws.” The pamphlet also contains statements such as “The Bush administration has
13 weakened key sections of the Clean Air Act, allowing power plants and factories to avoid
14 implementing technologies that reduce polluting emissions.” According to the pamphlet,
15 “President Bush could halt and even reverse air and water pollution—if he wanted to.”
16 Declaring “This year, our vision counts,” the pamphlet directs the reader to “Email President
17 Bush at president@whitehouse.gov” and “Tell him to stand up to corporate polluters.” It
18 concludes with “Get the facts at www.sierraclubvotes.org It’s in OUR hands.”

19 **2. The “Friend” and “TED” Communications Do Not Contain Express**
20 **Advocacy**

21
22 The Commission’s definition of express advocacy is at 11 C.F.R. § 100.22. The first part
23 of this regulation defines “expressly advocating” as a communication that uses phrases such as
24 “vote for the President,” or “support the Democratic nominee’ . . . , or individual word(s), which

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1 in context can have no other reasonable meaning than to urge the election or defeat of one or
2 more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which
3 say 'Nixon's the One,' 'Carter '76,' 'Reagan/Bush' or 'Mondale!'" 11 C.F.R. § 100.22(a). The
4 second part of this regulation encompasses a communication that, when taken as a whole or with
5 limited reference to external events, "could only be interpreted by a reasonable person as
6 containing advocacy of the election or defeat of one or more clearly identified candidate(s)
7 because" it contains an "electoral portion" that is "unmistakable, unambiguous, and suggestive of
8 only one meaning" and one as to which "reasonable minds could not differ as to whether it
9 encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages
10 some other kind of action." 11 C.F.R. § 100.22(b).

11 Neither the "Friend" nor "TED" pamphlet contains language comparable to the
12 illustrative phrases contained in 100.22(a). Nor do they "in effect" contain an explicit directive
13 to take electoral action, *MCFL* at 249; *see also FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 62
14 (D.D.C 1999) ("*Christian Coalition*").² In fact, neither makes any reference to an election. In
15 "Friend," the pamphlet emphasizes Senator Kerry's Senate voting and legislative record on
16 environmental issues, and readers are directed to e-mail Senator Kerry at his Senate website "and
17 ask him to continue protecting our environment." Senator Kerry in fact was a Senator at the time
18 and in a position to vote on or sponsor environmental legislation. Similarly, the TED pamphlet

² In *MCFL*, the Supreme Court found that a newsletter that set out the positions of the candidates, highlighting and identifying those candidates whose pro-life views were consistent with those of MCFL, and then urged voters to "VOTE PRO-LIFE!" provided "in effect an explicit directive" to vote for the candidates favored by MCFL, and hence, contained express advocacy. In *Christian Coalition*, a district court found that a mailing that identified Newt Gingrich as a "Christian Coalition 100 percenter" and encouraged the reader to "take [an enclosed Congressional scorecard] to the voting booth," in effect explicitly told the reader to vote for Gingrich, and therefore constituted an express advocacy communication.

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1 directs readers to email President Bush at the White House website,” and “[t]ell him to stand up
2 to corporate polluters,” an action he was in a position to effect.

3 “Friend” and “TED” also do not qualify as express advocacy communications under
4 100.22(b). First, neither contains an explicit “electoral portion,” let alone one that is
5 “unmistakable, unambiguous, and suggestive of only one meaning.” Moreover, reasonable
6 minds could differ whether the action urged—contacting the Senator or the President to tell him
7 how to deal with environmental issues—“could only be interpreted . . . as containing advocacy
8 of” the election of Kerry or the defeat of Bush in an upcoming election or encouraged readers to
9 lobby the two in their incumbent positions to promote positions favored by the Sierra Club.

10 Because “Friend” and “TED” are not express advocacy communications, we recommend
11 that the Commission find no reason to believe that the Sierra Club violated 2 U.S.C. § 441b in
12 connection with the production and distribution of these pamphlets.

13 **B. “The Dirt” Pamphlet**

14 The Sierra Club’s response to the complaint maintains that two of the challenged
15 communications were voter guides “specifically permitted under the Federal Election
16 Commission’s regulations at Section 114.4(c)(5).” Response at 2. Respondent asserts that these
17 pamphlets do not encourage the reader to vote for or against any candidate. Rather, according to
18 respondent, the pamphlets merely:

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1 describe the records and positions of the two Presidential candidates, and
2 in one case the Senate candidates running in Florida, and encourage the
3 recipients to find out more about the candidates before voting. The pieces
4 provide a brief description of the issues and citations to the original
5 sources relied upon regarding the candidates' positions in the event that
6 recipients would like to conduct additional research. Each candidate is
7 credited with his or her positions that, in the view of the Sierra Club,
8 promote or detract from environmental protection. Recipients are left to
9 make their own judgments on the candidates and whose positions they favor.

10
11 *Id.*

12 **1. Description**

13 "The Dirt" pamphlet is one of the two mail pieces respondent characterizes as voter
14 guides. "The Dirt" identifies the major party candidates for president (President Bush and
15 Senator Kerry) and reviews their respective records on environmental issues. Although this
16 communication includes a disclaimer explicitly stating that it is "not intended to advocate the
17 election or defeat of any candidate," its review of the candidates' positions leaves no doubt that
18 the Sierra Club views Senator Kerry's environmental stance more favorably than President
19 Bush's record. For instance, while John Kerry is touted for "[building] a 30-year record of
20 supporting strong environmental protection," the communication claims that President Bush "has
21 consistently chosen to protect the interests of his oil and gas industry campaign contributors at
22 the expense of public health, the environment, and a safer and sensible energy policy." "The
23 Dirt" directs the reader to "Dig deeper for facts about the candidates for president" and to
24 "CHECK THE FACTS." See Attachment 3. Additionally, it ends with the phrase: "To learn
25 more: www.sierraclubvotes.org."

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1 **2. “The Dirt” Pamphlet Does Not Contain Express Advocacy**

2 Under the Commission’s voter guide regulations, corporations are permitted to prepare
3 and distribute voter guides to the general public consisting of two or more candidates’ positions
4 on campaign issues, but such guides may not contain express advocacy. 11 C.F.R.

5 § 114.4(b)(5)(i). Consistent with the regulations, the “The Dirt” pictures and identifies President
6 Bush and Senator Kerry, and contains narratives concerning their respective environmental
7 records from the Sierra Club’s perspective. Thus, the only issue is whether “The Dirt” contains
8 express advocacy. We believe it does not.

9 “The Dirt” does not contain words or “in effect” explicit directives that urge the election
10 or defeat of Senator Kerry or President Bush. *See* 11 C.F.R. § 100.22(a). Rather, it prominently
11 directs readers to “Dig deeper for facts about the candidates for president,” and to “CHECK THE
12 FACTS.” While the communication indicates that the Sierra Club views Senator Kerry’s
13 environmental record as better than President Bush’s, it does not tell readers explicitly or “in
14 effect” for whom to vote, urging them instead to take actions to further educate themselves.

15 Moreover, the limited “electoral portion”—directing readers to “Dig deeper for facts
16 about the candidates for president”—even coupled with the Sierra Club’s well-known views on
17 environmental regulation, is not “unmistakable, unambiguous, and suggestive of only one
18 meaning”; reasonable minds could differ as to whether it encourages electoral, or some other
19 action. *See* 11 C.F.R. § 100.22(b). One can reasonably view the directives to “Dig deeper for
20 facts...” and “CHECK THE FACTS” as encouraging readers to obtain more information about
21 the candidates, and not limit themselves to that contained in the pamphlet, before deciding for
22 whom to vote.

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1 Because "The Dirt" is not an express advocacy communication, we recommend that the
2 Commission find no reason to believe that the Sierra Club violated 2 U.S.C. § 441b in
3 connection with the production and distribution of this pamphlet.

4 **C. The "Conscience" Pamphlet**

5 **1. Description**

6 The "Conscience" pamphlet prominently leads with the exhortations to the reader to
7 "LET YOUR CONSCIENCE BE YOUR GUIDE," "LET YOUR VOTE BE YOUR VOICE"
8 (emphasis in the original), accompanied by pictures of gushing water, picturesque skies,
9 abundant timber, and people enjoying nature. Attachment 4. It then compares President Bush's
10 and Senator Kerry's environmental records in three categories: (1) toxic waste cleanup, (2) clean
11 air, and (3) clean water, and, despite the disclaimer on the address page stating that the voter
12 guide is "not intended to advocate the election or defeat of any candidate," shows a marked
13 preference for Senator Kerry's record. For example, in the toxic waste cleanup category, it touts
14 Kerry as a "leader on cleaning up toxic waste sites" while stating that "President Bush is
15 weakening the law that requires power plants and other factories to install modern pollution
16 controls." In each of three categories, the pamphlet assigns a "checkmark symbol" in one or two
17 boxes next to either one or both candidates; of the two candidates, only Senator Kerry receives
18 checkmarks in every box in all three categories, whereas President Bush receives only one
19 checkmark in a single category (clean air), and in that category, there are two checkmarks for
20 Kerry.

21 To the right of the comparisons between Kerry and Bush, the "Conscience" pamphlet also
22 compares U.S. Senate candidates from Florida, Mel Martinez and Betty Castor, in three

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1 categories: (1) toxic waste cleanup, (2) clean air, and (3) energy. Ms. Castor's environmental
2 record in all three categories is presented "favorably," with a checkmark in all three boxes next to
3 her position, while Mr. Martinez does not receive any checkmarks.³ The pamphlet concludes
4 with: "Find out more about the candidates before you vote. Visit www.sierraclubvotes.org."

5 **2. The "Conscience" Pamphlet Contains Express Advocacy**

6 **a. Express Advocacy under 11 C.F.R. § 100.22(a)**

7 Unlike the other three pamphlets, this Office believes that "Conscience" contains express
8 advocacy under both 100.22(a) and (b), although this is admittedly a close call. With respect to
9 100.22(a), as in *MCFL* and *Christian Coalition*, the voter guide provides "in effect" an explicit
10 directive to vote for those candidates whose positions have been identified as in accord with
11 those of the sponsoring organization. Specifically, the voter guide portrays protecting the
12 environment as a matter of conscience, with the words "LET YOUR CONSCIENCE BE YOUR
13 GUIDE," accompanied by images extolling a healthy environment; and it highlights by means of
14 checkmarks those candidates whose pro-environment records meet the dictates of conscience and
15 directs voters to "LET YOUR VOTE BE YOUR VOICE." As in *MCFL*, although the voter
16 guide's message is "marginally less direct than vote for" Kerry and Castor, that "does not change
17 its essential nature." *MCFL* at 249. It is also similar to the mailing in *Christian Coalition*
18 because, with the use of checkmarks, it identifies Senator Kerry and Betty Castor as the
19 conscience "100 percenters" that voters should vote for. *See Christian Coalition*, 52 F.Supp.2d.
20 at 65.

³ In the "toxic waste cleanup" and "clean air" categories, the Sierra Club simply stated that for Mr. Martinez there was "no stance on record." Mr. Martinez's record in the "energy" category is described negatively.

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1 **b. Express Advocacy under 11 C.F.R. § 100.22(b)**

2 The “Conscience” pamphlet also contains express advocacy under section 100.22(b). It
3 was distributed before the November 2, 2004 General Election and identifies the two leading
4 candidates for President and U.S. Senate in Florida, respectively. With limited reference to these
5 factors, as well as to the Sierra Club’s well-known stance promoting environmental regulation,
6 the electoral portion of this communication—“LET YOUR CONSCIENCE BE YOUR GUIDE
7 and LET YOUR VOTE BE YOUR VOICE”—is “unmistakable, unambiguous, and suggestive
8 of only one meaning”: vote for Senator Kerry and Betty Castor. Moreover, reasonable minds
9 could not differ as to whether the pamphlet encourages readers to vote for Senator Kerry and
10 Betty Castor or encourages some other kind of action. Although the pamphlet concludes by
11 directing the reader to “Find out more about the candidates before you vote. Visit
12 www.sierraclubvotes.org,” this tag-line, viewed in the context of the whole communication,
13 does not convert the pamphlet into a mere starting point for further information.⁴

14 We are mindful that one could argue that the “reasonable mind” of a voter favoring
15 relaxed or loose environmental regulation could regard the words “LET YOUR CONSCIENCE
16 BE YOUR GUIDE and LET YOUR VOTE BE YOUR VOICE,” with the accompanying voting
17 records and checkmarks, as encouragement to vote for President Bush and Mel Martinez.
18 However, even in that case, the action encouraged is voting in a particular way. The “reasonable
19 mind” standard need not encompass every possible explanation that a creative individual might
20 conjure. Courts routinely apply “reasonable person” tests as objective tests that do not depend

⁴ When accessed, the “sierraclubvotes” website contains the same type of information as the pamphlet, with a critical characterization of President Bush’s environmental record and a favorable view of Senator Kerry’s environmental stance.

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1 upon the preference of any one person or group, including the specific people involved in the
2 lawsuit at issue. *See, e.g., Wyatt v. Cole*, 504 U.S. 158, 166 (1992). We think the “reasonable
3 mind” viewing the “Conscience” pamphlet “could only [] interpret []” this pamphlet “as
4 containing advocacy of the election” of Senator Kerry and Betty Castor. *See* 11 C.F.R.
5 § 100.22(b).

6 In characterizing this conclusion as “a close call,” we recognize that the “Conscience”
7 pamphlet contains substantive information regarding the candidates’ environmental records, and
8 thus presents a harder case than MUR 5024R (Council for Responsible Government, Inc.), in
9 which the Commission, recently found reason to believe that
10 respondents violated 2 U.S.C. § 441b by making prohibited independent expenditures. In that
11 matter, the brochures criticizing Congressional candidate Tom Kean contained little or no
12 discussion of public issues, and focused only on the candidate’s qualifications or lack of political
13 experience, making them exclusively electoral in content. In *MCFL*, however, the Supreme
14 Court, in considering a newsletter that contained some discussion of issues, found that it could
15 not “be regarded as a mere discussion of public issues that by their nature raises the names of
16 certain politicians.” *MCFL* at 249. Rather, the newsletter went “beyond issue discussion to
17 express advocacy. The disclaimer of endorsement cannot negate this fact.” *Id.* Similarly, in the
18 instant MUR, despite addressing environmental issues, we believe the “Conscience” pamphlet
19 cannot “be regarded as a mere discussion of public issues that by their nature raises the names of
20 certain politicians ” Instead, by also urging “LET YOUR CONSCIENCE BE YOUR GUIDE
21 and LET YOUR VOTE BE YOUR VOICE,” accompanied by images and checkmarks that “in

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1 effect” direct voters to vote for particular candidates, the “Conscience” voter guide crosses the
2 line into express advocacy. The disclaimer contained therein does not alter this conclusion.

3 **c. Sierra Club I and Subsequent Developments**

4 Our conclusion that the “Conscience” pamphlet contains express advocacy was also
5 informed by our recommendations in MUR 5154 (“Sierra Club I”), a case concluded in 2003,
6 and the accompanying Statements of Reasons. In Sierra Club I, the Commission considered
7 whether a mailer distributed by the Sierra Club before the 2000 General Election contained
8 express advocacy. The top of the mailer carried the statement: “Before you vote on November 7
9 Know Their Record on the Environment.” The mailer then pictured and identified Senator Robb
10 as the incumbent, and his opponent, George Allen, as a “candidate for Virginia Senate,” and
11 underneath their pictures described each candidate’s record on a number of environmental issues.
12 Robb’s record received three checkmarks, indicating that as to those issues, he “supports Sierra
13 Club position,” and Allen received one checkmark and two “thumbs down,” the latter indicating
14 that as to those issues, he “opposes Sierra Club position.” The mailer also provided a percentage
15 rating (77% for Robb, 13.5% for Allen) based on the candidate’s environmental voting records in
16 Congress. At the bottom of the page, the Sierra Club I mailer stated “Sierra Club. Protect
17 Virginia’s environment, for our families, for the future.”

18 This Office concluded that this mailer contained express advocacy pursuant to 100.22(a),
19 based largely on the reasoning found in *MCFL* and *Christian Coalition*, and therefore
20 recommended that the Commission find reason to believe that the Sierra Club violated the Act by
21 making prohibited corporate expenditures. In Sierra Club I, after voting 3-3 on the substantive
22 recommendations, the Commission voted 6-0 to dismiss the matter. Those Commissioners

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1 voting to approve the substantive recommendations and those voting not to approve them then
2 issued separate Statements of Reason.

3 In analyzing the communication in Sierra Club I, those Commissioners who concluded
4 there was no express advocacy considered only 100.22(a), noting that 100.22(b) had been
5 declared unconstitutional by courts in the First and Fourth Circuits, and they also cited cases
6 defining "express advocacy" narrowly to include only communications with explicit words of
7 advocacy (*i.e.*, magic words). *See* Statement of Reasons by Commissioners Smith, Mason, and
8 Toner in MUR 5154 (Sierra Club), at 2. According to those Commissioners, "The better view is
9 to conclude that [the communication in Sierra Club I] does not fall within the narrow confines of
10 "express advocacy" as articulated in cases and our regulations." *Id.* at 3. Their determination
11 also rested in part on their concern that

12 [w]ere we to adopt the approach set forth in the General Counsel's report... then
13 any group's voter guide that announced an upcoming election, set forth the records
14 of candidates, and set forth the group's issue preferences would seem to become
15 "express advocacy." This approach would effectively make it impossible for any
16 group to publish a meaningful voter guide.

17
18 *Id.*

19
20 Subsequent to the issuance of that Statement of Reasons, the Supreme Court decided
21 *McConnell v. FEC*, 124 S.Ct. 619 (2003). In discussing express advocacy for another purpose,
22 the Court concluded that express advocacy is a statutory construction, not a constitutional

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1 boundary for the regulation of election-related speech.⁵ 124 S.Ct. at 688. The Court explained:

2 A plain reading of *Buckley*⁶ makes clear that the express advocacy limitation ... was
3 the product of statutory interpretation rather than a constitutional command. ...
4 [O]ur decisions in *Buckley* and *MCFL*⁷ were specific to the statutory language before
5 us; they in no way drew a constitutional boundary that forever fixed the permissible
6 scope of provisions regulating campaign-related speech.

7
8 *Id.* at 688.

9 The circuit courts cited in the Statement of Reasons as having found section 100.22(b)
10 invalid appeared to proceed, at least in part, from an understanding that express advocacy is a
11 constitutional imperative and that accordingly, under the First Amendment, "FEC restriction of
12 election activities was not to be permitted to intrude *in any way* upon the public discussion of
13 issues." *Maine Right to Life Comm., Inc. v. FEC*, 914 F. Supp. 8, 12 (D. Maine 1996) (emphasis
14 added), *aff'd*, 98 F.3d 1 (1st Cir. 1996). *See also Virginia Society for Human Life v. FEC*,
15 263 F.3d 379, 391-92 (4th Cir. 2001). To that extent, these prior decisions were wrongly
16 reasoned, which at the very least raises a question as to whether these courts would reach the

⁵ The *McConnell* Court discussed express advocacy principally to afford context in evaluating the constitutionality of an alternative standard for determining when communications are intended to influence voters' decisions and have that effect. *McConnell* did not involve a challenge to the express advocacy test or its application, nor did the Court purport to determine the precise contours of express advocacy to any greater degree than did the Court in *Buckley v. Valeo*, 424 U.S. 1 (1976). For example, the Court did not illuminate the permissible use of context and timing to discern what speech is or is not express advocacy. Such considerations are unavoidable. The phrase "Support President Bush," for example, had a vastly different meaning two days before Election Day than it did two days after Election Day. Importantly, *McConnell* also did not address the validity of section 100 22(a) or (b), nor cite the Commission's regulation for any purpose.

⁶ In *Buckley*, to avoid constitutional overbreadth or vagueness problems, the Supreme Court construed certain provisions of the Act "to reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate." 424 U.S. at 80.

⁷ In *MCFL*, the Supreme Court held that to avoid constitutional overbreadth or vagueness problems, a corporate expenditure for a general public communication, if made independent of a candidate and/or his campaign committee, "must constitute 'express advocacy' in order to be subject to the prohibition of § 441b." 479 U.S. at 249.

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1 same conclusion today.⁸

2 Presumably, too, a court now addressing a constitutional challenge to section 100.22(b)
3 would have to account for the Supreme Court's decision upholding the "promote, support, attack,
4 or oppose" standard against a constitutional vagueness challenge, as the Court found that the
5 standard "give[s] [a] person of ordinary intelligence a reasonable opportunity to know what is
6 prohibited." 124 S.Ct. at 675, n. 64 (quoting *Grayned v. City of Rockford*, 408 U.S. 104 108-109
7 (1972)). Likewise, a court now addressing a constitutional challenge to section 100.22(b) would
8 have to account for *McConnell's* decision upholding BCRA's electioneering communication
9 provision against a constitutional overbreadth challenge. In upholding that provision, *McConnell*
10 acknowledged that the definition of electioneering communication would cover some ads which
11 have no electioneering purpose, but noted that "whatever the precise percentage [of such ads]
12 may have been in the past, in the future, corporations and unions may finance genuine issue ads
13 during those time frames by simply avoiding any specific reference to federal candidates, or in
14 doubtful cases, by paying for the ad from a segregated fund." *Id.* at 696.

15 By its very terms, section 100.22 is a carefully tailored provision,⁹ and everything that the
16 Supreme Court said in *McConnell* about the nature of express advocacy applies to this regulation.
17 In particular, section 100.22 is consistent with *McConnell's* emphasis on the language contained

⁸ In any event, the "Conscience" pamphlet was distributed in the Eleventh Circuit, which has never addressed the question of the constitutionality of section 100 22(b) Absent a ruling in that circuit that the regulation is invalid, the Commission is bound to apply its regulations to matters before it See *Chamber of Commerce v FEC*, 69 F 3d 600, 603 (D C. Cir. 1995); *Reuters Ltd v FCC*, 781 F 2d 946, 950 (D C Cir. 1986). Cf *US v Mendoza*, 464 U S. 154 (1984) (holding that an adverse ruling against the federal government in one circuit does not prevent the government from litigating the same issue before another circuit court)

⁹ Express advocacy, in addition to being used as a narrowing construction applied by the Supreme Court in *Buckley* and *MCFL*, is also itself a statutory term See 2 U.S.C §§ 431(17) (definition of "independent expenditure"), 441d (disclaimer requirements) Accordingly, the Commission possesses broad authority to interpret the term, to "formulate policy" on it, 2 U.S.C § 437c(b)(1), and "to make, amend, and repeal such rules as are necessary" regarding it, 2 U.S.C. § 437d(a)(8). See also 2 U.S.C §§ 438(a)(8), 438(d)

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1 in express advocacy communications. Section 100.22(a), for example, contains the specific
2 phrases from *Buckley* that *McConnell* noted are “examples of words of express advocacy ... that
3 eventually gave rise to what is now known as the ‘magic words’ requirement.” *McConnell*, 124
4 S.Ct. at 687. Section 100.22(a) also covers words “which in context can have no other
5 reasonable meaning than to urge the election or defeat” of a candidate. Similarly, section
6 100.22(b) covers communications that contain an “electoral portion” that is “unmistakable,
7 unambiguous, and suggestive of only one meaning” and about which “reasonable minds could
8 not differ as to whether it encourages actions to elect or defeat” a candidate. These restricting
9 terms ensure that section 100.22(b) will encompass only a “tiny fraction of the political
10 communications made for the purpose of electing or defeating candidates during a campaign.”¹⁰
11 124 S.Ct. at 702.

12 Finally, in view of this Office’s analysis of all the pamphlets at issue in this matter, the
13 concern expressed in the Statement of Reasons that this Office’s approach in *Sierra Club I*
14 “would effectively make it impossible for any group to publish a meaningful voter guide,” should
15 be allayed. Our analysis that the *Sierra Club*’s “Dirt” voter guide did not contain express
16 advocacy shows that corporations are in fact able to publish genuine and meaningful voter
17 guides, even ones showing preferences for particular candidates’ records, without crossing the
18 line into express advocacy.

19 Based on the above, this Office recommends that the Commission find reason to believe
20 that the *Sierra Club, Inc.* violated 2 U.S.C. § 441b(a) by making prohibited corporate

¹⁰ The Court found that the express advocacy test is easily evaded by advertisers, and in that respect it has become “functionally meaningless” 124 S.Ct. at 689. This observation was nothing new. The limits of the express advocacy test were acknowledged in *Buckley* and have been noted by courts ever since. *See id.*

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1 expenditures in connection with the publication and distribution of "Conscience."

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10 **IV. RECOMMENDATIONS**

11 1 Find reason to believe that Sierra Club, Inc violated 2 U.S.C. § 441b(a) in connection
12 with the publication and distribution of the pamphlet entitled "Let your Conscience be
13 your Guide."

14 2. Find no reason to believe that Sierra Club, Inc. violated 2 U.S.C. § 441b(a) in connection
15 with the publication and distribution of the pamphlets entitled "From one friend of our
16 environment to another," "The Environment for Dummies," and "The Dirt."

17 3. Approve the attached Factual and Legal Analysis.

18 4.

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1 5. Approve the appropriate letter.

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4 8/10/05

5 Date

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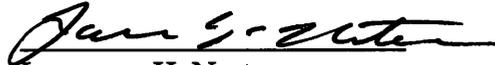
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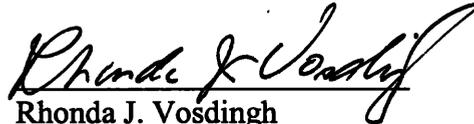
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24 **Attachments:**

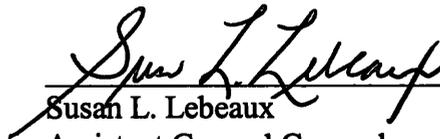
- 25 1. "Friend" pamphlet
- 26 2. "TED" pamphlet
- 27 3. "Dirt" pamphlet
- 28 4. "Conscience" pamphlet
- 29 5. Factual and Legal Analysis



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